No. 294

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

CITY BANK FARMERS TRUST COMPANY, formerly known as The Farmers Loan and Trust Company, as Administrator of the goods, chattels and credits of HELEN HALL VAIL, deceased,

Petitioner,

against

GEORGE T. McGOWAN, Collector of Internal Revenue for the Twenty-Eighth Collection District, New York,

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

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GEORGE T. McGOWAN, Collector of Internal Revenue for the Twenty-Eighth Collection District, New York.

BRIEF FOR PETITIONER

Opinions Below

The opinion of the District Judge upon the trial of the case is printed at pages 387-400 of the Record and is reported in 43 Fed. Supp. 790.

The majority opinion of the Circuit Court of Appeals for the Second Circuit, which affirmed the judgment of the United States District Court for the Western District of New York, entered May 14, 1943 (R. 416), and the dissenting opinion, which were handed down May 10, 1944, are printed at pages 436-444 of the Record and are reported in 142 F. (2d) 599.

Jurisdiction

The mandate of the Circuit Court of Appeals was entered on May 27, 1944 (R. 444). The petition for certiorari was filed on July 27, 1944 and granted on October 9, 1944. The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, § 1, 43 Stat. 938 (28 U. S. C. A. Section 347).

Question Presented

Whether annual allowances out of the surplus annual income of an incompetent person, duly adjudged incapable of managing her person and affairs, paid by the Committee of the Property, pursuant to orders of the New York Supreme Court, to various members of her family, over a period of approximately nine years preceding her death, and comprising approximately 200 quarter-annual payments of allowance moneys for the benefit of these persons, were transfers made by the decedent in contemplation of her death and, therefore, part of decedent's estate taxable under the Federal Estate Tax Law (Revenue Act of 1926, Section 302 (c), as amended; now Section 811 (c) of Internal Revenue Code).

Statement of the Case

This action was instituted in the District Court for the Western District of New York by the Administrator of the Estate of Helen Hall Vail for a refund of estate taxes alleged to have been illegally and erroneously assessed and collected upon a deficiency assessment (R. 2-12). This deficiency was in addition to the sum of $419,616.73 of Federal estate taxes levied and collected upon assets of the decedent, Helen Hall Vail, on hand at the date of her death, as to which sum no claim for refund is made or here involved (R. 362).

In August, 1926, the decedent, in a proceeding in the New York Supreme Court, was duly adjudicated to be incompetent (R. 78) and a Committee of the Property was appointed by that Court (R. 83). The incompetent lived until December 27, 1935 (R. 74), a period of some nine years.

The incompetent was a very wealthy woman. For the four or five years preceding the adjudication of her mental incompetency her income had averaged over $300,000 per year (R. 171-172). In 1926, the year in which she was com-

mitted, her total gross income was $651,000 as against $308,000 in 1925 (R. 163). Prior to her incompetency she had lived in great luxury (R. 149-150; 230-232) which she shared with her daughters both before and after their respective marriages (R. 226-227; 241-243; 305-306). In addition she had been in the habit over many years prior to her incompetency of making outright gifts, both by way of annual allowances and very substantial additional gifts, to her children (R. 134-135; 166; 169; 278). Also, she was mindful of the real financial need of her brother and sisters (R. 112; 116; 129).

As a result of her incompetency, Mrs. Vail's mode of living became drastically restricted. Although she was surrounded by every available comfort at the private sanatorium to which she was confined (R. 100), the total amount which could reasonably be expended for her care and the care of her property did not exceed $50,000 per year (R. 172). She could no longer enjoy her mansions in Florida and in Geneva, New York, and her summer home in Spring Lake, New Jersey. And her bounty to her children and to her brother and sisters perforce ceased.

In October, 1926, after Mrs. Vail had been declared incompetent, her daughter, MaBelle Houghton Plumb, applied to the New York Supreme Court for an order directing the Committee of the Property to pay to the persons named in the petition annual allowances from the income of the incompetent to the extent that the Court might find that such allowances would have been made by the incompetent had she been competent and mentally normal (Pl. Ex. 9, R. 54; 96-101).

Hearings were held before a referee (Pl. Ex. 14, R. 56; 106-160) and on the basis of the testimony and the findings of the Referee (Pl. Ex. 15, R. 56; 161-169), the New York Supreme Court entered an order (Pl. Ex. 16, R. 56; 170-174) which, among other things, found that her income for the previous five years had averaged $300,000 per year and that to maintain and support the incompetent and care properly

for her and her property there could not reasonably be expended more than $50,000 a year and "that if the said incompetent Helen Hall Vail, were in the possession of her mental faculties and in all respects competent, she would desire the allowances hereinafter fixed to be made to the persons hereinafter designated" (R. 172) and directed the following annual allowances to be made to the following relatives of the incompetent from the income of the incompetent:

MaBelle Houghton Plumb, a daughter	$50,000.
Ieuan Harris, General Guardian of John H. Harris, William R. Harris and David F. Harris, minor grandchildren (sons of a deceased daughter)	$50,000.
Edward Hageman Hall, a brother	$ 2,000.
Mary Hall Taft, a sister	$ 3,000.
Elizabeth Hall Burdick, a sister	$ 2,000.
Abbe Ferrin, a sister	$ 2,000.
Lucy H. Ferris, a sister	$ 2,000.

(R. 172-173)

In 1932, after a further hearing before a referee appointed by the New York Supreme Court (Pl. Ex. 26, R. 59; 91-270), the aforesaid annual allowances out of income to the daughter and to the General Guardian of the three minor grandchildren of the incompetent were each increased by $25,000 per annum, payable quarterly out of surplus annual income. This order further directed that these increased allowances be made retroactive for five and one-quarter years and paid out of the then accumulated surplus annual income of the incompetent (Pl. Ex. 30, R. 60; 285-293).

The order of the New York Supreme Court, dated June 1932, contained findings that accumulated income in the hands of the Committee then amounted to a sum in excess of $1,000,000, that the income of the incompetent for a period of five and one-half years prior thereto had averaged about $295,000 a year and the surplus income, after paying all

penses, including allowances theretofore granted by the
7 allowance order, and paying all expenses on account
the incompetent for care and maintenance of her and
property, had averaged about $191,000 per annum, and
t if the incompetent had been in possession of her mental
ulties and in all respects competent, she would have de-
ed that the allowances fixed by said order of June 3,
2 be made and would have made such annual allow-
es out of her income (R. 286-287).

In no instance was the principal of the incompetent's
ate to be expended under either of these orders; they
cifically provided that all of the allowances were to be
d out of income (R. 15; 21).

Over a period of approximately nine years the Commit-
of the Property, obedient to said orders of the New York
preme Court, paid out of the incompetent's surplus in-
e to the persons named in the orders, allowances which
regated the sum of $1,377,886.67 (R. 26-34). There
e, in all, approximately 200 quarter-annual payments
llowances to nine different individuals, extending over
riod of nearly nine years (R. 26-34). The Federal Gift
was paid on all amounts (above allowable exemptions)
after its effective date. (*City Bank Farmers Trust Co.*
ey, 23 Fed. Supp. 831 (S. D., N. Y., 1938), *aff'd*, 101 F.
9 (C. C. A. 2nd, 1939).

On the death of the said incompetent, Helen Hall Vail,
Administrator of her estate filed a Federal estate tax
rn showing a tax of $419,616.73 due on the assets on
l at the time of her death (R. 362). For information pur-
s a statement was included in said return describing
transfers by way of annual allowance pursuant to the
York Supreme Court orders which are involved in the
ant case. The above mentioned tax of $419,616.73 was
when the estate tax return was filed, and no claim for
nd with respect to any of said tax has been filed and no
thereof is in dispute or involved in the instant case.
ever, the aggregate of the payments made pursuant
rders of the New York Supreme Court was included by
Commissioner of Internal Revenue in the incompetent's

estate for Federal estate tax purposes on the theory that such payments were made in contemplation of death. An additional tax, including interest, of $466,912.27 was thereon assessed and paid, claim for refund was duly filed and rejected, and the Administrator in this action sued for a refund of the additional tax (R. 2-12).

The case was tried by the District Court, without a jury, which granted judgment in favor of the plaintiff to the extent of $54,100.24 and for the defendant as to the remainder of the amount sued for (R. 416-417) on the theory that the allowances, to the extent of $6,000 per annum to each branch of the family and of $500 paid annually to one of the collateral relatives, were not made in contemplation of death but that the same allowances, to the extent that they exceeded $6,000 and the allowances to the other collaterals, were made in contemplation of death and in "anticipation of the succession to the estate of the incompetent" (R. 411). This decision of the District Court was affirmed by the Circuit Court of Appeals for the Second Circuit, with Swan, J., dissenting (R. 436-444).

Specification of the Errors to Be Urged

Petitioner specifies as errors the adverse holdings of the Court below, as follows:

(1) The Court below erred in holding that the allowances paid by the Committee, pursuant to orders of the New York Supreme Court, to the daughter and grandchildren of the incompetent were transfers in contemplation of death within the purview of the statute (Revenue Act of 1926, Section 302 (c) as amended; now Section 811 (c) of the Internal Revenue Code).

(2) The Court below erred in holding that the allowances paid by the Committee, pursuant to orders of the New York Supreme Court, to the brother and sisters of the incompetent were transfers in contemplation of death within the purview of the statute (Revenue Act of 1926, Section 302 (c) as amended; now Section 811 (c) of the Internal Revenue Code).

(3) The Court below erred in holding that Section 302 (c), of the Revenue Act of 192[illegible], as amended; now Section 811 (c) of the Internal Revenue Code, is to be construed as embracing transfers which were not made by the decedent but from her property.

(4) The Court below erred in holding that Section 302 (c) of the Revenue Act of 1926, as amended; now Section 811 (c) of the Internal Revenue Code, is to be construed as embracing such a transfer as the Federal court finds would have been made by the incompetent during a lucid interval, in which imminent incompetency is contemplated.

(5) The Court below erred in holding that Section 302 (c), of the Revenue Act of 1926, as amended; now Section 811 (c) of the Internal Revenue Code, is to be construed as including transfers of property of a decedent, merely because the result is to benefit donees who would eventually inherit the decedent's property, even though death be not contemplated.

(6) The Court below erred in holding that testamentary motive may be attributed to the orders of the New York Supreme Court, which directed the payment of these allowances.

(7) The Court below erred in holding that the intent of the court must control rather than such intent, if any, as may be found in the incompetent upon an examination of the record.

(8) The Court below erred in holding that the payments of income directed by the orders of the New York Supreme Court were substitutes for testamentary disposition because made out of income of an incompetent person, who had no power to dispose of it and could not enjoy it during life.

(9) The Court below erred in holding that the Record of this case shows that the allowances directed by orders of the New York Supreme Court arose from motives associated with death rather than with life.

(10) The Court below erred in holding that the intent of the New York Supreme Court could be split so as to result in a decision that the allowances were in contemplation of death to the extent that they exceeded $6,000 per annum, but not in contemplation of death to the extent that they were less than that amount.

(11) The Court below erred in holding that it was within its province to review the discretion exercised by the New York Supreme Court in awarding allowances out of the surplus income of the incompetent.

SUMMARY OF ARGUMENT

Counsel for Petitioner will argue:

I

The Federal Estate Tax Law was not enacted by Congress, and cannot be construed, to embrace transfers by way of annual allowances out of the surplus income of an incompetent person granted by a state court pursuant to its general equity jurisdiction.

The statute (Revenue Act of 1926, Section 302 (c), as amended; now Section 811 (c) of Internal Revenue Code) provides, in effect, that to be taxable as in contemplation of death, a transfer must be made by the decedent himself and the required testamentary motive must be his. This Court and all other courts have consistently construed the statute as requiring such testamentary motive. A transfer of the decedent's property by another, where the decedent had no knowledge of it and, particularly, where the decedent did not, in law or in fact, entertain any testamentary motive is not embraced within the language of the statute upon any reasonable construction. It contains no verbiage from which it may be inferred that Congress desired to tax transfers of the surplus income of an insane person pursuant to orders of an equity court. To so hold, as did the

lower Court, is pure judicial legislation. No agency or privity between the insane person and the Court existed, and there is no reason in a case where the transfers are subject to the Gift Tax Law and have been taxed, as some of them have in this case, to strain for a distorted construction of the statute.

II

Long established principles of equity as adopted and practiced by the New York Supreme Court preclude it from making transfers in contemplation of death or of a testamentary nature. The Circuit Court of Appeals below conceded that a motive or intent must be found in order to characterize the transfer as one in contemplation of death (R. 438). That Court also conceded that such a motive or intent could not be found in the incompetent herself, but purported to find it in the New York Supreme Court which granted the allowances (R. 438). The New York Supreme Court did not have the jurisdiction or power to indulge in the testamentary motive or intent required by the Federal Estate Tax Law as construed heretofore by this and other courts. The orders granting the allowances must be presumed to have been within the jurisdiction of the New York Supreme Court.

III

The record is devoid of evidence that the New York Supreme Court exceeded its powers in this case. The records in the New York proceedings show that the New York Supreme Court did not go beyond its power and indulge in any testamentary motive or intent. They show that the allowances were granted for purposes associated with life; that there was no purpose to provide for the recipients at or after the death of the incompetent; that there was no purpose to avoid Federal estate taxes; that there was no testamentary motive indulged in by the New York Supreme Court.

IV

The Court below erred in assuming to sit as a court of review of the New York Supreme Court and in finding, in effect, that the allowance orders made by that Court were beyond its jurisdiction and power and an abuse of its discretion.

In holding that only the excess of the allowances over $6,000 per annum to the daughter and grandchildren of the decedent is to be deemed taxable as a transfer in contemplation of death, it is evident that the Court below undertook to review the proceedings in the New York Supreme Court. It was, however, not within the province of the Federal court to supersede the determination of the New York Supreme Court as to what allowances should be made. The power to transfer or distribute property of an incompetent is essentially a matter of local law.

V

The Circuit Court of Appeals erred in holding that the allowances are to be deemed within the purview of the Estate Tax Law because by such a disposition the donees anticipated benefits receivable by them upon the death of the decedent. In reaching its conclusion, the Court below overlooked the necessity for motive in the application of the statute to the transfers involved. Even this argument is unavailable in the case of gifts to the collateral relatives, who, upon the death of Mrs. Vail intestate, were entitled to no share in her estate. It appears from the Record that the gifts to them were entirely dictated by their need. The necessary result of the decision of the lower Court is that every transfer out of the surplus income of an insane person is taxable as a transfer in contemplation of death. No language can be found in the statute to support such a construction. As thus construed, the statute arbitrarily and capriciously discriminates against the estates of insane persons and violates the due process clause of the Fifth Amendment of the Constitution of the United States.

ARGUMENT

POINT I

The annual allowances paid by the Committee were not gifts in contemplation of death within the purview of the statute. The decision of the lower courts involves a distorted construction of the Act unnecessary to the Congressional purpose, which was to tax substitutes for testamentary dispositions.

NOTE: The jurisdiction of the New York Supreme Court to grant allowances out of the surplus income of an incompetent person's estate, together with the long-established equitable principles as adopted and practiced by the State court and the limitations upon the powers of that Court, which preclude it from making transfers of a testamentary nature, are fully discussed in Point II, *infra*, p. 17.

The pertinent provisions of the applicable statute involved (Revenue Act of 1926, Section 302 (c) as amended; now Section 811 (c) of Internal Revenue Code) are as follows:

> "SEC. 811 GROSS ESTATE.
>
> "The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside the United States—
>
> "(c) *Transfers in contemplation of, or taking effect at death.* To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or

intended to take effect in possession or enjoyment at or after his death, * * *."

The leading case construing the phrase "in contemplation of death" is *United States* v. *Wells*, 283 U. S. 102 (1931).

The following quotations from the opinion of this Court in the *Wells* case, *supra*, will suffice:

"* * * The question, necessarily, is as to the state of mind of the donor." (p. 117).

* * * * *

"* * * The words 'in contemplation of death' mean that the thought of death is the impelling cause of the transfer, * * *." (p. 118).

* * * * *

"If it is the thought of death, as a controlling motive prompting the disposition of property, that affords the test, it follows that the statute does not embrace gifts *inter vivos* which spring from a different motive * * *." (p. 118).

The applicable Regulations of the Treasury Department (priated in Appendix, pp. 45-48, *infra*) have in substance adopted the foregoing and other language of the *Wells* case.

See also:

Milliken v. *United States*, 283 U. S. 15 (1931);
Heiner v. *Donnan*, 285 U. S. 312 (1932);
Colorado National Bank, et al. v. *Commissioner*, 305 U. S. 23 (1938).

As stated in the dissenting opinion of Judge Swan in the instant case:

"The statutory language as interpreted by Treasury Regulations and by the opinions of the Supreme

> Court, clearly shows that the operative fact which brings the section into play is 'the state of mind' or 'motive' of the donor at the time of the transfer. • • • " (R. 442).

The lower Court admitted that the incompetent was not capable of having any intent and, accordingly, looked to the New York Supreme Court for an intent which it could attribute to the incompetent so as to bring this case within the statute (R. 438).

Certainly, the language of the statute does not cover this case. But the Circuit Court of Appeals in disregard of the plain mandate of the statute, that not only must the "transfer" be *by the decedent* but the "contemplation" must be that *of the decedent*, construed the section to read: " 'any interest • • • of which at any time a transfer has been made *from* the decedent in contemplation of death' " (R. 438) (italics ours). In so holding, the majority Court below recognized that it was indulging in judicial legislation when it stated that although the words of the statute do not apply to this case, 'if Congress had been faced with a situation like that before us, it would have included payments made by the court out of the property of an incompetent; to hold otherwise would be to frustrate the plain purpose of the section." (R. 438).

There is not the slightest evidence that Congress would have done any such thing or that its purpose in enacting the section would otherwise be frustrated. The plain fact is that Congress was striking at the evasion of estate taxes by a decedent making gifts in contemplation of death.[1] There is nothing to indicate that Congress intended to penalize wards of the sovereign and their estates in court custody, or that Congress was fearful lest courts would

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[1] "• • • The dominant purpose [of the section] is to reach substitutes for testamentary dispositions and thus to prevent the evasion of the estate tax. • • •" *U. S.* v. *Wells*, 283 U. S. 102, 116-117. See also, *Milliken* v. *U. S.*, 283 U. S. 15, 23.

either exceed their jurisdiction by making allowances out of such persons' surplus income, or would seek by such devices to evade the payment of revenues to the Federal government, and incidentally to their respective state governments. The whole evidence is to the contrary, namely, that Congress intended the statute to reach only to cases where the motive and the impelling force of the gift stemmed from the decedent.

The extension of the statute by the Court below beyond the clear import of its language disregards decisions of this Court and violates the elementary rule applicable to the construction of a taxing act, namely, that tax statutes are not to be extended by implication beyond the clear import of the language used.

> *Crooks, Collector* v. *Harrelson*, 282 U. S. 55 (1930);
> *Shwab* v. *Doyle*, 258 U. S. 529 (1922);
> *Gould* v. *Gould*, 245 U. S. 151 (1917).

As Judge Swan states in his dissenting opinion in this case:

> "* * * The allowances in question have been subjected to a gift tax under the Revenue Act of 1932. *City Bank Farmers Trust Co.* v. *Hoey*, 2 Cir., 101 F. 2d 9. I am unable to find in the words of section 302 (c) adequate language to subject them to the estate tax. * * * Whether Congress would wish to impose an estate tax on gifts made out of an incompetent's surplus income by court order for the support and education of his family seems to me the merest surmise. At any rate, it has not said so in language justifying the courts in so holding. * * *" (R. 443, 444).

Nor can such a construction be supported on any theory of agency. The power of an equity court to deal with an incompetent's estate is not derivative from the incompetent, but flows directly from the sovereign. No relationship of principal and agent or any other manner of privity exists between an insane person and the court.

In *Sporza* v. *German Savings Bank*, 192 N. Y. 8 (1908), the New York Court of Appeals said, at page 14:

> "Jurisdiction is inherent in the state over unfortunate persons within its limits who are idiots or have been deprived of the use of their mental faculties. * * *"

The construction adopted by the Circuit Court of Appeals also disregards other decisions to the effect that the Estate Tax Law is not designed to reach all transfers (*Colorado National Bank, et al.* v. *Commissioner*, 305 U. S. 23) and is a part of a more comprehensive plan which includes the Gift Tax Law. The Estate Tax Law and the Gift Tax Law are in *pari materia* and their history and relationship to one another is clearly outlined in the opinion of Judge Swan in *Hesslein* v. *Hoey*, 91 F. (2d) 954 (C. C. A. 2nd, 1937), *cert. denied*, 302 U. S. 756 (1937).

See, also:

Burnet v. *Guggenheim*, 288 U. S. 280, 286 (1933);
Estate of Sanford v. *Commissioner*, 308 U. S. 39, 42 (1939);
Rasquin v. *Humphreys*, 308 U. S. 54 (1939).

In the *Sanford* case, *supra*, Mr. Justice Stone, speaking for the Court, said at p. 42:

> "In ascertaining the correct construction of the statutes taxing gifts, it is necessary to read them in the light of the closely related provisions of the revenue laws taxing transfers at death, as they have been interpreted by our decisions. Section 319 *et seq.* of the Revenue Act of 1924, 43 Stat. 253, re-enacted as § 501 *et seq.* of the 1932 Act, 47 Stat. 169, imposed a graduated tax upon gifts. It supplemented that laid on transfers at death, which had long been a feature of the revenue laws. * * *"

All of the allowances now before this Court, which were paid after the effective date of the law and not within the

exemptions thereof, were subjected to gift tax in the case of *City Bank Farmers Trust Co.* v. *Hoey*, 23 Fed. Supp. 831 (S. D., N. Y., 1938), *aff'd*, 101 F. (2d) 9 (C. C. A. 2nd; 1939). In that case, no point was made that the allowances were not gifts within the meaning of the Gift Tax Law and the sole question was whether the gifts had been completed prior to the effective date of the Federal Gift Tax Act (June 6, 1932). While under the Estate Tax Law the finding necessary to support a gift in contemplation of death is not a mere donative intent but a particular state of mind, namely, the thought or contemplation of death, not even a donative intent is necessary to render a transfer subject to the Federal Gift Tax Law (Revenue Act of 1932, Sections 501, 503) which covers cases such as this. See also, *Commissioner* v. *Greene*, 119 F. (2d) 383 (C. C. A. 9th, 1941), *cert. denied*, 314 U. S. 641 (1941).

The decision of the Circuit Court of Appeals, holding, as it did, that the transfer, by a state court, of portions of the surplus income of an incompetent person who could not contemplate anything, was a transfer by the deceased incompetent in personal contemplation of her death, involves a distorted construction of Section 302 (c) of the Revenue Act which finds no support in the history of this legislation or in the decisions of this Court (cases, *supra*). Such a construction is wholly unnecessary to the Congressional purpose and is inconsistent with the comprehensive scheme embodied in the Estate Tax and Gift Tax Laws. We find nothing out of harmony with this view in the recent decision of this Court in *Smith* v. *Shaughnessy*, 318 U. S. 176 (1943). In that case, this Court, in an opinion by Mr. Justice Black, pointed out that the Gift and Estate Tax Laws are not always mutually exclusive. It did not involve payments pursuant to court order out of the income of an incompetent person. Transfers not within the purview of the Estate Tax Law are taxed by its supplement, the Gift Tax Law, and when that occurs, there is no need

or reason for a court to invoke a strained construction of the Estate Tax Law to bring the transfer within its scope.

POINT II

Testamentary motive may not be attributed to the orders of the New York Supreme Court which had no power to grant allowances "in contemplation of death".

From the inception of our system of common law the sovereign, pursuant to his power as *parens patriae*, was the protector of lunatics.[2] At an early date, this function was delegated to his Chancellor, not as head of the Chancery Court, but as the King's personal representative. The

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[2] The duty of the Sovereign to these wards of the state and members of their families received statutory recognition as early as 1326. "The King shall have the Custody of the Lands of natural Fools taking the Profits of them without Waste or Destruction, and shall find them their Necessaries, of whose Fee forever the Lands be holden. (2) And after the Death of such Idiots he shall render it to the right Heirs, so that such Idiots shall not aliene, nor their Heirs shall be disinherited."

"Also the King shall provide, when any (that beforetime hath had his Wit and Memory) happen to fail of his Wit, as there are many *per lucida intervalla*, that their Lands and Tenements shall be safely kept without Waste and Destruction, and that they and their Household shall live and be maintained competently with the Profits of the same, and the Residue besides their Sustentation shall be kept to their Use, to be delivered unto them when they come to right Mind; (2) so that such Lands and Tenements shall in no wise be aliened: (3) and the King shall take nothing to his own Use; (4) And if the Party die in such Estate, then the Residue shall be distributed for his Soul by the Advice of the Ordinary." 17 Edw. II c. IX, X, Pickering's Translation.

Chancellor's function under this delegation was confined to adjudication of lunacy and appointment of a conservator. By reason of his general jurisdiction over fiduciary matters, the Chancellor, as head of the court of equity, had had from the inception of that court, jurisdiction over the custody and management of estates or property of lunatics as to whom commitment and appointment of a conservator had been accomplished. Ultimately, both of these functions—(1) commitment, and appointment of a conservator of property, and (2) custody and management of property—though arising from different sources, became vested in the Chancery Court.

Pomeroy, *Equity Jurisprudence*, 4th Edition, 1918, Volume III, Section 1311;
Sporza v. *German Savings Bank*, 192 N. Y. 8 (1908);
Butler v. *Jarvis*, 4 N. Y. Supp. 137 (1889).

When this country became independent of Great Britain, all the powers of the former English Court of Chancery became vested in the New York Court of Chancery and, later, in the New York Supreme Court which succeeded to the powers of both the Law and the Chancery Courts. In the State of New York the two types of jurisdiction—(1) commitment, and appointment of conservator of property and (2) custody and management of property—became merged in the New York Supreme Court. The delegation to the New York Supreme Court by the sovereign, the State, of the power to commit and appoint a conservator (called a "committee") is found in Sections 1356 ff. of the New York Civil Practice Act (printed in Appendix, pp. 49-52, *infra*), and while some of the committee's powers and duties are also found there, the New York Supreme Court continues, except as the said statute is inconsistent therewith, to exercise its jurisdiction over the management of the incompe-

tent's property by virtue of its general equity powers which it inherited from the English Chancery Court.[3]

In the case of *In Re Andrews*, 192 N. Y. 514, 523 (1908), the New York Court of Appeals said:

> "The present Constitution of the state, adopted in 1894, continues the Supreme Court 'with general jurisdiction in law and equity.' (Const. art. VI sec. 1.) This preserves the jurisdiction over lunatics and their property which was originally vested in the chancellor and Court of Chancery, and was subsequently transferred to the old Supreme Court, as it existed prior to the adoption of the Constitution of 1846. That jurisdiction, however, as to the manner of its exercise may be regulated by the Legislature, and where this has not been done, it is to be exercised according to the established practice of the courts in lunacy cases. * * *"

The general principles of equity governing the custody and management of the property of incompetents, as adopted and practiced by the New York Supreme Court, may be stated briefly as follows:

1. The real custodian of the incompetent's estate is the Court, and the committee is merely the agent or bailiff of the Court (*Lewis* v. *Jones*, *infra*, pp. 24-25).

2. The Court's authority does not in any way derive or stem from the incompetent person, but is inherent. The jurisdiction over the commitment and appointment of a conservator of the incompetent's property stems directly from the sovereign, and the jurisdiction over the management of the incompetent's property stems from the Court's general jurisdiction over fiduciary matters. The Court is not the legal representative or agent of the incompetent. There is no

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[3] It is thus clear that the power of the New York Supreme Court derives entirely from the sovereign and from its own inherent equity powers and not from the incompetent. The effect of this fundamental distinction on this case is discussed at pages 14-15, *supra*.

privity between the Court and the incompetent (*Sporza* v. *German Savings Bank, supra*, p. 15).

3. The primary consideration controlling the management and custodianship of the incompetent's property is that it shall not be wasted or destroyed but must be preserved for the possibility of the incompetent's recovery. (*Pomeroy*, p. 18, *supra*, *Ex parte Whitbread*, p. 21, *infra*, and *Lewis* v. *Jones*, *infra*, pp. 24-25.)

4. The Court has no authority to make a will for an incompetent nor to make any testamentary disposition of the incompetent's property of any nature (*Lewis* v. *Jones*, *infra*, pp. 24-25).

5. The Court's authority over the incompetent's affairs ceases immediately upon the incompetent's death, and it has no power to control or make any disposition of the incompetent's property effective thereafter (New York Civil Practice Act, Section 1383. Printed in Appendix, pp. 51-52, *infra*; *Lewis* v. *Jones*, *infra*, pp. 24-25).

6. The Court has the jurisdiction and power to grant such allowances out of surplus income as it finds on the record before it that the incompetent would probably have granted himself had he been sane (see following discussion).

Principle numbered 6 above, a long established principle of equity, is one that has been followed by the Chancery Courts of England and by the Chancery and New York Supreme Court. The extent to which this is true may be seen from the following citation of some of the cases in which litigation has developed in connection with the granting of such allowances and in which the principle has been reaffirmed.

Matter of Blewitt, 131 N. Y. 541, 546 (1892);
Sporza v. *German Savings Bank*, 192 N. Y. 8 (1908);
In Re Andrews, 192 N. Y. 514 (1908);
Matter of Flagler, 248 N. Y. 415 (1925);

Parsee Merchant's Case, 11 Abb. Prac. N. S. 209, 219 (1871);
Ex Parte Whitbread, 2 Mer. 99; 35 Eng. Rep. 878 (1816);
Matter of Willoughby, 11 Paige 257 (1844);
Matter of Heeney, 2 Barb. Ch. 326 (1847).

The primary duty of the court is to preserve an incompetent's property for possible recovery of sanity, and allowances are granted only out of surplus income because of the principle of protection by the sovereign which requires that the care of an incompetent and his property must first be provided for. The amount and proportions of such allowances are entirely within the discretion of the court, and the allowances are not necessarily to be confined to such amounts as may be necessary for the support of the recipients thereof, nor confined to persons legally dependent upon the incompetent.

A clear statement of the principle is to be found in the leading English case, *Ex parte Whitbread, supra*, which has been frequently cited with approval and followed by the New York courts. At page 102 of Merivale's Report, Lord Eldon said:

> "• • • So also, where the father of a family becomes a lunatic, the Court does not look at the mere legal demands which his wife and children may have upon him, and which amount, perhaps, to no more than may keep them from being a burthen on the parish,—but, considering what the Lunatic would probably do, and what it would be beneficial to him should be done, makes an allowance for them proportioned to his circumstances. But the Court does not do this because, if the Lunatic were to die tomorrow, they would be entitled to the entire distribution of his estate, nor necessarily to the extent of giving them the whole surplus beyond the allowance made for the personal use of the Lunatic.
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> • • • • •

> "* * * and if we get to the principle, we find that it is not because the parties are next of kin of the Lunatic, or, as such, have any right to an allowance, but because the Court will not refuse to do, for the benefit of the Lunatic, that which it is probable the Lunatic himself would have done."

This principle, as stated by Lord Eldon, has no reference to the death of an incompetent—in fact, the court expressly refuses to consider kinship to the incompetent as a ground for granting the allowances. The court is governed only by a consideration of how the incompetent would probably desire his surplus income to be used during the continuance of his life. It so happens that next of kin are usually the natural objects of a giver's bounty in his lifetime.

In the State of New York, the leading case is *Matter of Flagler* (p. 20, *supra*). At p. 418 the Court of Appeals stated in an opinion by Lehman, J.:

> "If Mrs. Flagler to-day could decide upon the disposition of the income of her great estate, moral or charitable considerations would dictate her decision only to the extent that she felt their force. Her great affluence might impel her to relieve the distress of her cousin; the law would not compel her to do so if she decided otherwise. The power of the court to dispose of her income is not plenary. The court may not be moved by its own generous impulses in the disposition of the income of the incompetent. *In reaching decision it may give to moral or charitable considerations only such weight as it finds that the incompetent herself would have given to them.* Allowances for the support of collateral relatives of the incompetent have been made 'upon the theory that the lunatic would, in all probability, have made such payments if he had been of sound mind.' (*Matter of Lord*, 227 N. Y. 145.) The Appellate Division correctly held that the allowance made at Special Term may be justified upon no other theory. *Upon an examination of the record* we find that the evidence leads logically to the conclusion that Mrs. Flagler, if sane, would to-day provide some relief for the petitioner." (Italics ours.)

Thus it is held by the New York Court of Appeals that what the incompetent would have done if sane is to be established by the record before the court which grants the allowances. The Circuit Court of Appeals in the instant case, however, has misapprehended and misapplied the law of the State of New York and held that:

> "* * * the intent of the court must control in deciding whether the payments were made in 'contemplation of death,' for obviously the incompetent herself could have no intent of any kind. The judges' intent was to make such gifts as the incompetent would have made, if she had been competent, so the orders said; but that cannot have meant such gifts as she would have made, had she been not only competent, but expecting to continue competent until she died. It must have meant such gifts as she would have made, if for the moment lucid, *but with the prospect of imminent incompetency before her.*" (R. 438.) (Italics ours.)

There is no basis whatsoever in the statutes of New York or in the decisions of its courts for the theory of the Circuit Court of Appeals that the jurisdiction and power of the New York courts is limited to granting such allowances as the incompetent would have made if for the moment sane "but with the prospect of imminent incompetency before her." The New York rule is, as expressed above in the *Flagler* case, that the allowances may be granted "upon the theory that the lunatic would, in all probability, have made such payments if he had been of sound mind." This error of the Court below is important for its whole decision turns upon this misconstruction and misconception of the New York law.

Also, the result reached by the Circuit Court of Appeals is in obvious conflict with the New York decisions, because on the "lucid interval plus imminent insanity" theory which it formulated, and which Judge Swan in his dissenting opinion characterized as the "veriest fiction" (R. 443), the New York courts would be free to give away all of an in-

competent's property, save perhaps what might be required for his maintenance and support. This is not the law of New York.

The New York courts have no power to make any allowances out of the income of an incompetent on the theory that he is permanently insane. The property of such a person must be managed on the assumption that he may recover sanity. This is the whole purpose of the solicitude of the sovereign as evidenced by the conservation machinery set up by the law of New York.

As was said in *Ex Parte Whitbread, supra:*

> "* * * Nevertheless, the Court, in making the allowance, has nothing to consider but the situation of the Lunatic himself, always looking to the probability of his recovery, and never regarding the interest of the next of kin. * * *"

For the same reason, neither has the New York Supreme Court power to make a testamentary distribution of an incompetent's property. It cannot make a will for an incompetent person and it has nothing to do with the disposition of his property at or after his death.

> *The New York Civil Practice Act*, Sections 1357, 1382 and 1383 (printed in Appendix, pp. 50, 50-52, *infra*).

As was stated by the New York Supreme Court in *Lewis* v. *Jones*, 50 Barb. 645 (1868), at pages 649-650:

> "* * * The commission, certainly, does not authorize the committee to make a will for his ward; or to dictate to him the terms of it; nor does it vest such power in the court. That remains in the lunatic, or inebriate, or else it is suspended or extinguished. * * *"

And, again, at page 662:

> "The court has the charge and control of the estate, only during the continuance of the commis-

> sion; and by the appointment of the committee, it commits the exercise of most of its power to him. But the right of either, to control and care for the estate and person of the ward, are for his benefit; and there is nothing in the objects for which the court is vested with its authority over the estate, to sanction the idea, that either the court or committee have any thing to do with its disposition after his death."

In the absence of any finding by the Circuit Court of Appeals or the District Court below, that the New York Supreme Court exceeded its jurisdiction or abused its discretion in granting these allowances (and there is no such finding), it must be assumed that in this case the New York Court respected the New York law as above set forth and did not grant the allowances as transfers of a testamentary nature and that they were, therefore, not made in contemplation of death. As Judge Swan points out in his dissent—

> "* * * The state court which directed the payments to be made did not purport to make transfers in contemplation of death and had no legal power to do so. It cannot make testamentary dispositions for the incompetent, N. Y. Civil Practice Act, § 1283; * * *" (R. 443).

Except for the above expression of Judge Swan, both the lower Courts entirely disregarded the limitations on the New York Supreme Court's equitable jurisdiction which, as shown above, preclude it from making any transfers upon consideration of the incompetent's death or in the interest of next of kin. To hold, as the lower Courts did, that the New York Supreme Court granted the allowances in contemplation of the incompetent's death was to hold implicitly that the New York Supreme Court, in granting these allowances, exceeded these limitations upon its jurisdiction and the Courts below in so holding acted improperly and erroneously. The orders granting the allowances must be presumed in the absence of fraud or collusion to have been within the jurisdiction of the court which made them.

In *Voorhees* v. *Bank of The United States*, 10 Pet. 449 (1836), this Court said at p. 472:

> "• • • There is no principle of law better settled, than that every act of a court of competent jurisdiction shall be presumed to have been rightly done, till the contrary appears; and this rule applies as well to every judgment or decree, rendered in the various stages of their proceedings from the initiation to their completion, as to their adjudication that the plaintiff has a right of action. • • •"

See, also:

> *Freeman on Judgments*, 5th Ed. (1925) at page 831, Sec. 387, dealing with Presumptions as to Regularity in Exercise of Jurisdiction.

POINT III

The Record is devoid of evidence to sustain the determination of the Court below that the New York Supreme Court awarded the allowances in contemplation of death in violation of its jurisdiction.

When the Record is examined against the background of correct and well-established legal principles, it is found not only to be lacking in any substantial evidence to support the decision of the Court below but also to compel the opposite conclusion.

(a) The allowances were granted for purposes associated with life.

The material portions of the records of the two allowance proceedings instituted in 1926 and 1932, respectively, are in evidence in this case (R. 96-308). From these records it appears unmistakably that the alleged "transfer in contemplation of death" consisted of approximately two hundred separate quarter-annual payments made out of surplus

annual income over a period of approximately nine years preceding the incompetent's death to or for the benefit of the daughter, grandchildren, brother and sisters of the incompetent; all of such payments having been made by the Committee for the incompetent pursuant to orders of the New York Supreme Court (R. 170; 285). These records further show that the allowances were granted solely within the scope of the New York Supreme Court's jurisdiction and in accordance with the principle more particularly referred to above, i. e., that the court should direct the payments of such allowances as it believed the incompetent would in all probability have made if she had been of sound mind (R. 287; 169; 172; 275; 287).

The records of the allowance proceedings further show that the New York Supreme Court Justices who granted the allowances, Judge Lydon and Judge Ingraham, in seeking to ascertain what the incompetent would have done, took into account:

> (a) the generous and affectionate attitude of the incompetent toward her two daughters and her grandchildren (R. 134-135; 138; 166; 168-169; 226-227; 229-230; 231-232; 274);
>
> (b) the luxury in which the incompetent's children were raised (R. 166; 229-232);
>
> (c) the large increase in her income during the period of her incompetency (R. 147; 163; 234; 256-259; 275-278);
>
> (d) the station in life of the incompetent and her descendants, the evidence showing that the incompetent was the widow of Charles F. Houghton and that the income from his estate which she enjoyed was very large (R. 132-133; 147; 255-259), that she maintained at least three luxurious homes, having an aggregate appraised value in excess of $600,000 (R. 149-150), that she owned personal jewelry appraised at $177,418 (R. 150), that prior to her incompetency she lived in general luxury (R. 230-232; 307), and that this lavish mode of living was participated in by her daughters prior to their marriages

and thereafter during the period of decedent's sanity (R. 230-232; 226-227; 241-243; 305-306);

(e) the incompetent's well-defined practice of equalizing her gifts between the two branches of her immediate family (R. 135; 137-138; 166; 304); and

(f) in the case of the incompetent's collateral relatives, their need, as well as her past practice toward them, was taken into account and quite properly so, in ascertaining what the incompetent would in all probability have done for them (R. 112-130; 167).

Excepting that Mrs. Vail's disease was mental, the picture presented to the New York Supreme Court Justices when the applications for allowances were made was no different from that of any person possessed of a large income who, through physical, though not fatal, incapacity or other circumstances, finds his living requirements very much reduced and at the same time finds his income much increased. If the New York Supreme Court concluded under all the circumstances that the incompetent, having no further personal use during her incompetency for a portion of her increased income, would in all probability have turned parts of that portion over to her daughter and to her grandchildren, as well as to her brother and sisters, for their current use, how can it be said that the allowances were substitutes for testamentary dispositions?

In determining what the incompetent would in all probability have done by way of granting allowances, the New York Supreme Court Justices properly considered all the *indicia* that were before them when the allowance orders were made (*supra*, pp. 27-28). The Courts below, however, in concluding that all the allowances had been transferred in contemplation of death save for $6,000 per annum to each branch of the decedent's family, based their conclusion on one only of such *indicia*, namely, the regular annual allowance of $6,000 each which the decedent had made to her daughters long prior to incompetency and attributed one motive to the granting of these amounts and an entirely dif-

ferent and distinct motive to the granting of the balance.[4] The conclusion is inescapable that what the Courts below took upon themselves to do was to sit as some sort of a court of review to determine the propriety of the *quantum* of the allowances granted by the New York Supreme Court Justices, which, of course, they were not called upon, nor had any jurisdiction, to do. (See Point IV, *infra*, p. 36 ff.)

Under the New York law, its Supreme Court in the exercise of its equitable jurisdiction in granting allowances, is not limited to the amount or amounts which the incompetent had given antecedently while sane. That, as above stated, is but one of many factors. For example, in one of the several cases in which applications for allowances out of the surplus income of Mrs. Flagler were made, there was no evidence that any allowance or gifts whatsoever had been made by Mrs. Flagler, while sane, to the person applying for the allowances. Yet the court had no hesitance in granting them. *Matter of Flagler* (Tash), 126 Misc. 764 (N. Y. Supreme Ct., 1926), 214 N. Y. Supp. 631. It cannot now be said here by way of collateral attack on the allowance orders that the New York courts granted these allowances in amounts greater than "the lunatic would, in all probability, have made" if she had been "of sound mind." The mere fact that the allowances were substantially greater than the regular annual cash allowances given by this in-

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[4] Both of the Courts below overlooked the abundant evidence in the Record that in addition to the regular annual allowance of $6,000 to each daughter, the incompetent had on numerous occasions while sane made substantial additional gifts of money, property and money's worth. For example, at one time she gave each daughter a residence at a cost of $30,000 each (R. 135; 166; 232); she gave her daughters wedding presents (R. 134; 166; 232) and other cash gifts (R. 134; 135; 166; 232), money for extensive trips (R. 229; 231), paid for fashionable schools (R. 231) and expensive jewelry (R. 232; 303-304).

competent while sane does not make the excess testamentary in nature as the Courts below have held. And it is not within the province of the Treasury Department or of the Federal courts to impose a sanction on the free exercise of the equitable jurisdiction of the state courts in granting allowances by taxing such allowances as gifts in contemplation of death to the extent that they exceed either what the incompetent had given while sane, or what the Federal courts believed the incompetent probably would have given if she had been sane and in her then circumstances.

(b) The evidence shows complete absence of any purpose to provide for the recipients of the allowances at or after the death of the incompetent.

The main, if not sole, consideration which motivates a testator to make a testamentary disposition is his desire to make provision for the objects of his bounty after his death. In *First Trust & Deposit Co.* v. *Shaughnessy*, 134 F. (2d) 940 (C. C. A. 2nd, 1943), *cert. denied*, 320 U. S. 744 (1943), the Court which decided the instant case below pointed out the clear distinction under the Federal Estate Tax Law between a gift dictated by a desire to dispose of the property for beneficial use before the donor's death and a gift dictated by a desire to dispose of it for beneficial use after the donor's death and it stated at page 942 that the *Wells* case (*supra*, p. 12), "laid it down that in such situations the inclusion of the property within the donor's testamentary estate depends upon which of the two motives preponderates."

The evidence in this case shows conclusively that the allowances were not granted for the purpose of providing for the beneficiaries after the incompetent's death. In the first place, the allowances ceased automatically with the incompetent's death. Also, the New York Supreme Court in both of the allowance proceedings was well aware that under the terms of the will of the late Charles F. Houghton (the incompetent's first husband) both Mrs. Plumb and the Har-

ris children would be amply provided for from the very moment of the incompetent's death (R. 132-133; 151-152; 163-164; 168; 239; 255-258; 273; 274; 278). How then is it possible to infer that the allowances were intended as distributions, in advance, for the purpose of making provisions for the recipients after the death of the incompetent?

In every contemplation of death case which we have discovered, the alleged substitute for the testamentary disposition has consisted of a block of securities, or a lump sum, or the like, which, had no transfer been made, would presumably have been found in the transferor's estate at death. The instant case is unique in that the allowances (except the retroactive increases thereof which came out of accumulated surplus income) were directed to be paid in recurring quarter-annual instalments out of surplus *income*, and were, of course, dependent upon the continued lives of the incompetent and the respective donees; and likewise contingent upon there being sufficient surplus income to meet the payments. Had the incompetent herself made these allowances for purposes associated with life, how could it be said that they were substitutes for testamentary dispositions? Death has no place in this picture.

Nor were the allowances substitutes for testamentary dispositions within the doctrine of *Farmers Loan & Trust Co.* v. *Bowers*, 68 F. (2d) 916; *id.*, 98 F. (2d) 794 (C. C. A. 2nd, 1938), *cert. denied*, 306 U. S. 648 (1939), "The Astor Trust Case", as applied to the instant case by the Circuit Court of Appeals (R. 439). The theory that they were such substitutes because "made by one who could not enjoy the income during her life, but who must let it roll up and pass upon intestacy", (R. 439) wholly ignores and is in conflict with the only justifiable basis upon which the New York Supreme Court could grant such allowances, namely, that the incompetent would in all probability have made such payments if she had been of sound mind (See p. 23, *supra*).

That the surplus income of the incompetent which provided the allowances granted by the New York Supreme

Court, could never be used by the incompetent and that it was found to "roll up" and pass on her death to the recipients of the large allowances is, of course, mere conjecture. The recipients might well have died before the incompetent. Also, the incompetent might have, contrary to expectations of her physicians, recovered her sanity. Furthermore, her large income might unexpectedly have substantially diminished. In the first and second of these events, the allowances under the court orders would necessarily have automatically ceased. In the third of these events, the allowance orders would have been subject to being vacated or modified if the shrinkage in income resulted in there being insufficient income to care for the incompetent and her property, to pay her income taxes and pay the allowances as fixed in the original orders. In other words, the orders were contingent and revocable and were not by any means bound to continue, in full effect, or at all, until the incompetent's death.

It is significant to note in this connection that transfers in contemplation of death are included within the same category, indeed, in the very same phrase of the Estate Tax Law, as transfers intended to take effect at or after the death of the transferor (Internal Revenue Code, Section 811 (c); printed in Appendix, p. 45, *infra*).

In *Milliken* v. *United States*, *supra*, at p. 23, this Court said:

> "It is sufficient for present purposes, that such gifts are motivated by the same considerations as lead to testamentary dispositions of property, and made as substitutes for such dispositions without awaiting death, when transfers by will or inheritance become effective. Underlying the present statute is the policy of taxing such gifts equally with testamentary dispositions, for which they may be substituted, and the prevention of the evasion of estate taxes by gifts made before, but in contemplation of, death. * * *"

(c) The evidence shows that there was no purpose to avoid Federal Estate Tax.

Since the allowances were granted by the New York Supreme Court, it is inconceivable that they were motivated by any purpose of avoiding Federal Estate Tax. Certainly, they could not have been motivated by any such purpose with respect to the Estate Tax of New York, the Court's own sovereign, the law of which, in so far as the taxation of transfers in contemplation of death is concerned, is virtually identical with Section 811 (c) of the Internal Revenue Code (Article 10-c, Section 249 r. (3) of the New York Tax Law, printed in Appendix, p. 52, *infra*). We would hesitate even to interpose such a suggestion except for the significant fact that the presence or absence of a tax avoidance motive is a most important and usually controlling criterion in determining whether a gift is a transfer in contemplation of death under the Federal Estate Tax Law. That the motive of tax evasion is regarded as of prime importance in determining whether or not a gift is in contemplation of death is scarcely surprising, in view of the repeated pronouncements by this Court that the dominant purpose of the statute is to prevent the evasion of the estate tax.

U. S. v. *Wells*, 283 U. S. 102, 116 (1931);
Milliken v. *U. S.*, 283 U. S. 15, 23 (1931).

In *United States* v. *Cambridge Loan and Building Company*, 278 U. S. 55 (1928), at p. 59, this Court said that a State, through its legislature, "is not likely to be party to a scheme to enable a private company to avoid federal taxation * * *." We submit that it is even less "likely" that a state court of equity would be a party to such a scheme.

(d) The Record contains no evidence of testamentary motive.

The incompetent was physically in good condition at the time of the first allowance proceeding and this fact was established by uncontroverted expert testimony in those

proceedings (R. 108). Her mental condition was described by Dr. Riley as "somewhat delapidated" and he stated that due to an arterio-sclerotic condition of the brain, she was suffering from senile dementia and senile chorea (R. 109). There was, however, no evidence whatever before Judge Lydon that the incompetent's condition was such that an early death might be expected and this Court may take judicial notice of the well known fact that insane persons, when properly cared for, are likely to live as long, if not longer, than persons of sound mind. Indeed, if there had been any indication that the incompetent was soon to die, it is difficult to imagine her daughter ever instituting the allowance proceedings or why the Court should have granted the allowances, since they were wholly contingent on the continued life of the incompetent. The fact that she was not likely to recover (R. 195-196) was not an indication of an early demise but was an indication of permanent incompetency, a fact very pertinent to these proceedings since, if she should recover her mental power, the basis for the allowances granted by the Court, would disappear.

The incompetent was seventy-one years of age at the time the allowances were instituted by the court order of January 14, 1927 and this fact was brought out in the allowance proceedings (R. 112; 395). Decisions of this Court, the Circuit Court of Appeals and the Board of Tax Appeals have made it clear that seventy-one is far from a sufficiently advanced age to be an indication of contemplation of death. It has frequently been held that gifts made by donors in their eighties—and occasionally even in their nineties—were not made in contemplation of death. See, for example:

Colorado National Bank et al. v. *Commissioner*, 305 U. S. 23 (1938)—Age 80;

Commissioner v. *Nevin* (Wanamaker Estate), 47 F. (2d) 478 (C. C. A. 3rd, 1931), *cert. denied*, 283 U. S. 835 (1931)—Age 84;

Heiner v. *Donnan*, 285 U. S. 312 (1932)—Age 82;

Wishard v. *U. S.* (D. C. S. D. Ind. May 28th, 1943), C. C. H. Inheritance Tax Service 7th Ed., Par. 10,050 (not officially reported)—Age 82;

Rochester H. Rogers, Executor (Estate of Clinton Rogers), 21 B. T. A. 1124 (1931)—Age 91;

Willard Foster, et al., Executors v. *Commissioner*, 25 B. T. A. 414 (1932)—Age 85;

Topliffe, Administratrix v. *Commissioner*, 39 B. T. A. 13 (1939)—Age 84;

Estate of Charles L. Murfey, Latham W. Murfey, Administrator, B. T. A. Memorandum Opinion March 18, 1941, Prentice-Hall 1941, Federal Tax Service, Par. 64,387 (not officially reported)—Age 86.

The Circuit Court of Appeals recognized that some testamentary motive must be found (R. 438) and primarily rested the existence of such motive on the proposition, first, that the gifts were made by one who could not enjoy the income during her life (R. 439), and second, that the decedent had no power to dispose of the amounts covered by the allowances (R. 440). The Court in passing also commented on certain remarks of counsel for certain of the parties which were made in hearings before one of the referees. While it would appear obvious that such remarks could not be imputed to any court in determining its motive or reason for making an order (*Fayerweather* v. *Ritch*, 195 U. S. 276, 306-7 (1904); *U. S.* v. *Morgan*, 313 U. S. 409, 422 (1941)), the majority Court below apparently attributed little consequence to this, as is evidenced by the fact that when it came to discuss the allowances paid to the collateral relatives, as to whom those remarks were non-applicable, it reached the same conclusion as it did with respect to the allowances paid to the daughter and grandchildren, simply because there was no power in the incompetent either of enjoyment or disposition. If lack of power to enjoy or dispose be in and of itself sufficient to subject an allowance or other transfer to tax as

being in contemplation of death, then every allowance paid from the estate of an incompetent person would, of necessity, be so taxable, as is more fully pointed out at pp. 41-42, *infra*.

There is no substantial evidence in the records in the allowance proceedings indicating that the allowances were transfers in contemplation of death, and any effort on the part of the Government to derive comfort from the remarks of counsel above referred to vanishes before the legal presumption that the New York Supreme Court acted within its jurisdiction, which did not embrace the power to make a testamentary disposition of the surplus income or any other property of the incompetent. *Voorhees* v. *Bank of United States* (*supra*, p. 26).

POINT IV

The Court below erred in assuming to sit as a court of review of the New York Supreme Court and in finding, in effect, that the orders made by that Court were beyond its jurisdiction and in abuse of its discretion.

It is apparent, from a reading of the decisions of both the Courts below, that they were of the opinion that the New York Supreme Court should not have granted annual allowances, first of $50,000 and then of $75,000, to each of the two branches of the incompetent's immediate family, since the records in the allowance proceedings showed that the incompetent herself had, while sane, paid her two daughters regular cash allowances of only $6,000 each annually (R. 134-135). On the basis of this conclusion both of the lower Courts held that the annual allowances, first of $50,000 and then of $75,000, were not in contemplation of death to the extent of $6,000, but that the balance of the allowances over and above $6,000 annually were in contemplation of death. Stated otherwise, the District Court and

the Circuit Court of Appeals below have held, contrary to the specific findings in the orders of the New York Supreme Court granting the allowances, that the incompetent would *not* have desired "that the allowance hereinafter fixed be made to the persons hereinafter designated," and would *not* have made "such allowances to such persons out of her property," had she been sane. The Courts below have thus overruled the New York Supreme Court which had sole jurisdiction to determine, on the records before it, what the incompetent, if sane, would have done if her daughters had asked her for the payments for which application was made to the New York Supreme Court. Such action on the part of the Courts below is erroneous, arbitrary and a clear departure from the accepted and usual course of judicial proceedings, and should not be permitted.

This was a matter of local law and the Federal courts were not at liberty to substitute their judgment for that of the State court. Thus, in *Helvering* v. *Stuart*, 317 U. S. 154 (1942), at p. 161, this Court states, in an opinion by Mr. Justice Reed, applying the law of the State of Illinois:

> "* * * The power to transfer or distribute assets of a trust is essentially a matter of local law. *Blair* v. *Commissioner*, 300 U. S. 5, 9; *Freuler* v. *Helvering*, 291 U. S. 35, 43-45. * * *"

And again, in the same opinion, this Court stated at page 164:

> "* * * If reasonably avoidable we should certainly avoid becoming a Court of first instance for the determination of the varied rules of local law prevailing in the forty-eight states. * * *"

There is absolutely no basis whatsoever for this splitting, as between sums under and above $6,000 per annum, of the alleged intent of the New York Supreme Court in granting the allowances. There is nothing in the two refer-

ees' reports (R. 161, ff.; 271, ff.), nor in the two orders granting the allowances (R. 13, ff.; 18, ff.) to indicate that in the case of either order the New York Supreme Court gave any different consideration to, or had any different intent respecting, the allowances to the extent that they were below $6,000 and the allowances to the extent that they exceeded that sum. No reference to the figure of $6,000 per annum is found in either of the two allowance orders, and there is no basis in law for drawing any distinction between the allowances in so far as they were less than or exceeded $6,000 per annum.

In the first place, under the equity principles prevailing in New York, its Supreme Court was not limited in granting the allowances to the regular annual cash allowances which the decedent had given them while sane, even if she had not made other substantial additional gifts during her competency. (See Point II, *supra*, p. 17 ff.) But she did make very substantial additional gifts in money, property and money's worth (R. 135). (See footnote 4, p. 29, *supra*.) Furthermore the records before the New York Supreme Court show that in the year in which the first allowances were applied for, the incompetent's income was $651,000, as against $308,000 in 1925, the year before. (R. 163.) Such a tremendous increase would in and by itself justify a court of equity in granting larger allowances than had been paid by the incompetent when sane and when her income was less than half of what it was in the year in which the application for the allowances was made (R. 14). In addition to these factors the incompetent, because of her

enforced physical inactivity, resulting from her confinement to a sanatorium, was prevented from maintaining and living in her three residences and was prevented from spending money for traveling, recreation, from making gifts and from otherwise spending her funds in the normal way followed by a person of normal activities. Thus, ample reason will be found for justifying the increase from $6,000, which was only a part of what the incompetent had given to her daughters while she was sane, to $50,000 and $75,000 after her commitment.

It seems most natural and in accordance with common human experience that a person enjoying a rapidly and very substantially increasing income, restricted by circumstances beyond her control in the use thereof, should wish the natural objects of her bounty to have the current enjoyment and use of income which could be of no benefit or enjoyment to her. Certainly in the case of sane people allowances of income which they cannot make use of to their sons and daughters or other near relatives are made every day without any challenge that they are transfers in contemplation of death, and to the extent that such allowances exceed the exemptions, they are taxed under the Gift Tax Law. The very word "allowance" imports life, not death.

POINT V

The Circuit Court of Appeals erred in including in the taxable estate allowances paid to the collateral relatives of the incompetent with resulting discrimination between estates of incompetents and those of sane persons in violation of the Fifth Amendment.

The New York Supreme Court order of January 14, 1927 directed the payment of small annual allowances to the four sisters and the brother of the incompetent (herein referred to as the collaterals) (R. 16). These allowances aggregated $65,366.67 (R. 26-34).

The Record contains uncontradicted evidence of the financial need of these collaterals (R. 112-131). Much of this evidence was introduced in the form of letters written by them or in their behalf. The District Court was of the opinion that these were not competent evidence (R. 396). Clearly, whether or not these letters were competent evidence, was a question for the sole and exclusive determination of the New York Supreme Court, the forum of the proceeding. But even assuming that the State court improperly admitted evidence in the allowance proceeding, it by no means follows that the Federal court could or should find that allowances to collaterals which may have been based upon such evidence constituted gifts in contemplation of death.

In cases where allowances for collateral relatives are proposed, a court quite naturally explores the question of need and it may be a determining factor in the granting and fixing of such an allowance, because the court may well find no other reason or motive which would have induced the incompetent to make such allowance.

It is respectfully submitted that the apparent and dominant motive for granting the small annual allowances to the

collaterals was to alleviate their acute financial distress. Such a motive is associated with life, not death.

The majority of the Circuit Court of Appeals frankly expressed doubt of the application of the law to the allowances to the collaterals but, nevertheless, subjected them to the tax. In taxing the allowances to the daughter and grandchildren, who were in the line of succession, one of the principal factors relied upon by the Court below was that testamentary motive was to be inferred from the fact that these persons were the ones who would inherit the decedent's property in case of her death intestate. The taxation of the allowances to the collaterals, who would not inherit, obviously has no such support.

Thus, the Circuit Court of Appeals was squarely faced with the situation where there was no evidence in the Record of any kind as to testamentary purposes with reference to the allowances to be paid to the collaterals. Nevertheless, the Court stated as the basis of its decision as to this part of the case:

> "It is true that the allowances made to the brother and the sisters were not substitutes for that disposition of the property which would otherwise have taken place; on the contrary they diverted the money from those who would otherwise receive them. And yet it seems to us that it is enough to carry them along with the allowances to the daughter and grandchildren that the property transferred was beyond any power of the donor to enjoy, as were the remainders in The Astor Trust Cases; and that it was in addition beyond her individual power of disposition. Although they were not substitutes for the inevitable devolution of the property had they not been made, they were certainly testamentary in their character, and they were actuated by a motive of the sort that leads to testamentary dispositions. With less confidence as to these, we hold that they were also gifts 'in contemplation of death' within § 302 (c)." (R. 441).

The decision therefore construes the Act as being applicable to any transfer of property where (a) the owner himself could not enjoy the property and (b) where the owner himself could not dispose of the property. The effect of this decision, if permitted to stand, would be to render taxable, as a transfer in contemplation of death, every allowance paid out of an insane person's surplus income, inasmuch as such allowances may only be ordered by the court where provision is first made for the insane person's own needs. Thus no surplus income so transferred could ever be "enjoyed by the incompetent," and by hypothesis the incompetent could never himself dispose of it.

The necessary result of the decision, therefore, is to hold that while sane persons may make transfers which are not taxable as gifts in contemplation of death, every transfer made out of the surplus income of an insane person is taxable as such. No language can be found in the statute nor any intent on the part of Congress enacting it which would support the conclusion that the estates of insane persons are to be discriminated against in any such fashion. The statute, as construed by the majority Court below, would make such an arbitrary and capricious discrimination against estates of insane persons as a class as to render it violative of the due process clause of the Fifth Amendment of the Constitution of the United States.

Nichols v. *Coolidge*, 274 U. S. 531 (1927);
Hoeper v. *Tax Commission*, 284 U. S. 206 (1931);
Heiner v. *Donnan*, 285 U. S. 312 (1932);
Helvering v. *City Bank Farmers Trust Co.*, 296 U. S. 83, 92 (1935).

Conclusion

It is respectfully submitted that the allowances are not includible in the decedent's taxable estate as transfers made in contemplation of death. The judgment of the District Court, which was affirmed by that of the Circuit Court of

Appeals, should be modified and judgment directed to be entered for the petitioner in the sum of $466,912.27, the amount demanded in the complaint, with interest on said sum of $466,912.27 from June 22, 1938.

Respectfully submitted,

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Appendix

Revenue Act of 1926, Section 302 (c) as amended; now Section 811 (c) of Internal Revenue Code.

"SEC. 811. GROSS ESTATE.

"The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

* * * * * * *

"(c) *Transfers in contemplation of, or taking effect at death.* To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this subchapter;

* * * * * * *"

Treasury Department Regulations 80 (approved Nov. 7, 1934):

"ART. 15. *Transfers during life.*—The following transfers made by the decedent during his life, by trust or otherwise, other than bona fide sales for an

adequate and full consideration in money or money's worth, are subject to the tax: (1) transfers subsequent to the enactment of the Revenue Act of 1916 made in contemplation of death (see article 16); (2) transfers resulting from an arrangement, whether made before or after the enactment of the Revenue Act of 1916, if title was not to pass from the decedent to the beneficiary unless the latter survived the former, or title, having passed, was to be divested and the property returned to the decedent if the beneficiary predeceased him (see article 17); (3) transfers made after the enactment of the Revenue Act of 1916 in the case possession or enjoyment was retained by the decedent (see article 18 and the exception stated therein); (4) transfers in which the decedent retains, either alone or in conjunction with any person or persons, the right to designate who shall possess or enjoy the property or the income thereof, if made after the enactment of the Revenue Act of 1916 (see article 19 and the exceptions stated therein); and (5) transfers made before or after the enactment of the Revenue Act of 1916 in which the enjoyment of the transferred property was subject at decedent's death to any change through the exercise, either by decedent alone or with other person or persons, of a power to alter, amend, or revoke, or if after the enactment of the Revenue Act of 1916 such a power was relinquished by the decedent in contemplation of death (see articles 20 and 21).

"The value of transferred property includible in the gross estate is the value at the date of decedent's death. If a portion only of the property is so transferred as to come within the terms of the statute, only a corresponding proportion of the value of the property should be included in the gross estate. If the transferee makes additions to the property, or betterments, the enhanced value of the property at date of decedent's death, due to such additions or betterments, should not be included.

"To constitute a bona fide sale for an adequate and full consideration in money or money's worth it must have been made in good faith, and the price must have been an adequate and full equivalent, and reducible to a money value. If the price was less than an adequate and full equivalent only the excess of the fair market value of the property, as of the date of the decedent's death, over the price received by the decedent should

be included in the gross estate. For the purposes of the estate tax a relinquishment or promised relinquishment of dower, curtesy, or of a statutory estate created in lieu of dower or curtesy, or of other marital rights in the decedent's property or estate, is not to any extent a consideration in money or money's worth.

"In the case a transfer, by trust or otherwise, was made by a written instrument, duplicate copies thereof should be filed with the return. If of public record, one of the copies should be certified; if not of record, one copy should be verified. If the decedent was a nonresident, only one copy, certified or verified, need be filed.

"All transfers made by the decedent during his life of an amount of $5,000 or more, except bona fide sales for an adequate and full consideration in money or money's worth, must be disclosed in the return, whether the executor regards such transfers as subject to the tax or not. If the executor believes that such a transfer is not subject to the tax a brief statement of the pertinent facts should be made.

"ART. 16. *Transfers in contemplation of death.*—Transfers in contemplation of death made by the decedent after September 8, 1916, other than bona fide sales for an adequate and full consideration in money or money's worth, must be included in the gross estate. A transfer in contemplation of death is subject to the tax although the decedent parted absolutely and immediately with his title to, and possession and enjoyment of, the property.

"A transfer in contemplation of death is a disposition of property prompted by the thought of death. The phrase 'contemplation of death' as used in the statute is not limited to contemplation of imminent death or to an apprehension that death is near at hand. Death must be 'contemplated,' that is, the motive which induces the transfer must be such that leads to testamentary disposition. A gift inter vivos which springs from a motive essentially associated with life rather than with death is not made in contemplation of death.

"As the phrase 'transfer in contemplation of death' is applicable to many varying transactions, the circumstances of each case must be examined to ascertain the motive which induced the decedent to make the trans-

fer. If the transfer results from mixed motives, one of which is the thought of death, the more compelling motive controls. A condition of the mind or body of the transferor (whether occasioned by old age or disease) which naturally prompts a testamentary disposition to a proper object of his bounty, will be considered a decisive test of contemplation of death in the absence of proof of the existence of purposes associated with life as the dominant motive for the transfer.

"Any transfer without an adequate and full consideration in money or money's worth, made by the decedent within two years of his death, of a material part of his property in the nature of a final disposition or distribution thereof, is, unless shown to the contrary, deemed to have been made in contemplation of death. This provision applies even though the decedent died subsequent to the effective date of the Revenue Act of 1926 and prior to the effective date of the Revenue Act of 1932. (The conclusive presumption of contemplation of death as described in the second sentence of section 302(c) has been held to be void by the Supreme Court of the United States.)

"If the executor contends that the value of a transfer of $5,000 or more made by the decedent subsequent to September 8, 1916, should not be included in the gross estate because he considers that such transfer was not made in contemplation of death, he should file sworn statements with the return, in duplicate, of all the material facts and circumstances, including those directly or indirectly indicating the decedent's motive in making the transfer and his mental and physical condition at that time, and one copy of the death certificate.

"The fact that a gift was made as an advancement to be taken into account upon the final distribution of the decedent's estate is not, in and of itself, determinative of its taxability."

Revenue Act of 1932, Sections 501 and 503.

"SEC. 501. IMPOSITION OF TAX.

"(a) For the calendar year 1932 and each calendar year thereafter a tax, computed as provided in section 502, shall be imposed upon the transfer during such calendar year by any individual, resident or nonresident, of property by gift.

"(b) The tax shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible; but, in the case of a nonresident not a citizen of the United States, shall apply to a transfer only if the property is situated within the United States. The tax shall not apply to a transfer made on or before the date of the enactment of this Act.

"(c) The tax shall not apply to a transfer of property in trust where the power to revest in the donor title to such property is vested in the donor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of such property or the income therefrom, but the relinquishment or termination of such power (other than by the donor's death) shall be considered to be a transfer by the donor by gift of the property subject to such power, and any payment of the income therefrom to a beneficiary other than the donor shall be considered to be a transfer by the donor of such income by gift.

"SEC. 503. TRANSFER FOR LESS THAN ADEQUATE AND FULL CONSIDERATION.

"Where property is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration shall, for the purpose of the tax imposed by this title, be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year."

NEW YORK CIVIL PRACTICE ACT, SECTIONS 1356, 1357, 1358, 1377, 1382, 1383.*

"§ 1356. JURISDICTION OF SUPREME COURT; CONCURRENT JURISDICTION OF COUNTY COURT. The jurisdiction

* The citations from the New York Civil Practice Act are derived from Clevenger's Annual Practice of New York, 1944 Edition. The sections cited are substantially in the same form in which they existed in the years 1927 and 1932, respectively, the years in which the allowance orders were granted.

of the supreme court extends to the custody of the person and the care of the property of a person incompetent to manage himself or his affairs in consequence of lunacy, idiocy, habitual drunkenness, or imbecility arising from old age or loss of memory and understanding, or other cause. Where a county court has jurisdiction of those matters, concurrent with that of the supreme court, the jurisdiction of the court first exercising it, as prescribed in this article, is exclusive of that of the others with respect to any matter within its jurisdiction for which provision is made in this article.

"§ 1357. DUTY OF COURT HAVING JURISDICTION. The court exercising jurisdiction over the property of either of the incompetent persons, specified in the last section, must preserve his property from waste or destruction; and, out of the proceeds thereof, must provide for the payment of his debts and for the safe keeping and maintenance, and the education, when required, of the incompetent person and his family.

"§ 1358. JURISDICTION OF COURT TO BE EXERCISED BY COMMITTEE; [1]DESIGNATION OF CLERK.[1] The jurisdiction specified in this article, must be exercised by means of a committee of the person, or a committee of the property or of a particular portion of the property, of the incompetent person, appointed as prescribed in this article. The committee of the person and the committee of the property may be the same individual or different individuals, in the discretion of the court. [2]Every individual [3]*appointed as committee*[3] shall file in the office of the clerk of the court an instrument acknowledged or proved, and duly certified designating the clerk of the court and his successor in office, on whom service of any process issuing from the court may be made in like manner and with like effect as if it were served personally upon himself, whenever the individual so named as committee under the provisions of this article cannot be found and served within the state of New York, after due diligence used.[2] [4]*The clerk of the court shall thereafter issue the commission to the individual appointed as committee.*[4] [Am. L. 1935 ch. 155, in effect Sept. 1; L. 1939 ch. 617, in effect Sept. 1; L. 1943 ch. 535, in effect April 16.]

"Amendments:

—L. 1935 ch. 155 added matter at fig. 1s and 2s.

—L. 1939 ch. 617 added matter deleted by L. 1943.

—L. 1943 ch. 535 added matter at fig. 3s and 4s; and deleted at fig. 3s "before a commission is issued to him by the clerk of the court pursuant to the order appointing said individual as committee,".

"§ 1377. CONTROL, DUTIES AND POWERS OF COMMITTEE. A committee, either of the person or of the property, is subject to the direction and control of the court by which he was appointed, with respect to the execution of his duties; and he may be suspended, removed, or allowed to resign, in the discretion of the court. A vacancy created by death, removal or resignation may be filled by the court. But a committee of the property cannot alien, mortgage or otherwise dispose of real property, except to lease it for a term not exceeding five years, without the special direction of the court obtained upon proceedings taken for that purpose, as prescribed in this [act].

"A committee of the property may maintain in his own name, adding his official title, any action or special proceeding which the person with respect to whom he is appointed might have maintained if the appointment had not been made."

"§ 1382. RESTORATION OF PROPERTY. Where a person with respect to whom a committee is appointed, as prescribed in this article, becomes competent to manage himself or his affairs, the court must make an order discharging the committee of his property, or the committee of his person, or both, as the case requires, and requiring the former committee to restore to him the property remaining in the committee's hands. Thereupon the property must be restored accordingly.

"§ 1383. DEATH OF INCOMPETENT; DUTY OF COMMITTEE. Where a person, of whose property a committee has been appointed, as prescribed in this article, dies during his incompetency, the power of the committee ceases; and the property of the decedent must be administered and disposed of as if a committee had not been appointed. The committee, in such case, *shall* render to the court by which he was appointed a final

account of his proceedings touching the property of the incompetent. Notice of the application for settlement of such account shall be given, in such manner as the court may direct, to the sureties on the official bond of the committee or the legal representatives of such sureties, and to the executor or administrator of the decedent, if any; and if there be no executor or administrator, to the decedent's husband or wife, and heirs and next of kin, or if any of those persons shall have died, to his executor or administrator. [Am'd by L. 1935, ch. 724, in effect Sept. 1.]"

New York Tax Law, Article 10-c Section 249-r (3).

"§ 249-r. GROSS ESTATE.

"The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated (except real property situated and tangible personal property having an actual situs outside this state):

* * * * * * * *

"3. To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (a) the possession or enjoyment of, or the right to the income from, the property or (b) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property made by the decedent within two years prior to his death, without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this article;

* * * * * * * * *"